No. 04-1327

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In The
Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

I. Holmes' Constitutional Claims Are Properly Before the Court 1

II. Holmes' Convictions and Death Sentence Were Obtained in Violation of the Sixth and Fourteenth Amendments 3

A. Holmes' Case Is Not Materially Distinguishable from *Chambers v. Mississippi* and *Chambers* Requires Reversal Here 3

B. The South Carolina Rule Announced in Holmes' Case Is Aberrant 6

1. Other jurisdictions exclude third party guilt evidence only when it involves mere speculation that would confuse the jury 6

2. South Carolina has expanded its exclusionary rule in two ways that make it diverge radically from the traditional, commonplace state rule 9

C. The Arbitrary, Categorical Rule Erected in Holmes Violates a Defendant's Right to Present a Complete Defense 11

D. South Carolina Cannot Constitutionally Forbid a Defendant to Present Evidence of Third Party Guilt to the Jury in a Jury Trial When the Evidence is Competent, Reliable, and Central to His Claim of Innocence 12

III. The State Cannot Demonstrate that the Exclusion of Holmes' Evidence Implicating Jimmy White Was Harmless Beyond a Reasonable Doubt 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allen v. State, 813 N.E.2d 349 (Ind. App. 2004) 9

Baldwin v. Reese, 541 U.S. 27 (2004) 1

Burger v. Kemp, 483 U.S. 776 (1987) 3

Caldwell v. Mississippi, 472 U.S. 320 (1985) 2

Chambers v. Mississippi, 410 U.S. 284 (1973) 3, 4, 11, 13

Chapman v. California, 386 U.S. 18 (1967) 16, 19

Clemons v. Mississippi, 494 U.S. 738 (1990) 19

County Court of Ulster County v. Allen, 442 U.S. 140 (1979) 14

Crane v. Kentucky, 476 U.S. 683 (1986) 3, 12, 13

Green v. Georgia, 442 U.S. 95 (1979) 3

Howell v. Mississippi, 543 U.S. 440 (2005) 1

Jackson v. Virginia, 443 U.S. 307 (1979) 16

Kyles v. Whitley, 514 U.S. 419 (1995) 4

Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration, 113 U.S. 33 (1885) 3

Michigan v. Long, 463 U.S. 1032 (1983) 2

Montana v. Egelhoff, 518 U.S. 37 (1996) 14

Old Chief v. United States, 519 U.S. 172 (1997) 19, 20

Olden v. Kentucky, 488 U.S. 227 (1988) 13

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 12

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 3

TABLE OF AUTHORITIES – Continued

Page

Rock v. Arkansas, 483 U.S. 44 (1987) 3, 11, 13

Rose v. Clark, 478 U.S. 570 (1986) 16

Sandstrom v. Montana, 442 U.S. 510 (1979) 13

Satterwhite v. Texas, 486 U.S. 249 (1988) 19

Simmons v. South Carolina, 512 U.S. 154 (1994) 19

Skipper v. South Carolina, 476 U.S. 1 (1986) 19

United States v. Cabrerra, 1996 WL 135718 (C.C. Cir. Feb. 1996) 7

United States v. Gaudin, 515 U.S. 506 (1995) 13

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 13

United States v. Nobles, 422 U.S. 225 (1975) 12

United States v. Scheffer, 523 U.S. 303 (1998) 11, 15

Wardius v. Oregon, 412 U.S. 470 (1973) 4

Washington v. Texas, 388 U.S. 14 (1967) 15

Wright v. Georgia, 373 U.S. 284 (1963) 2

Yates v. Evatt, 500 U.S. 391 (1991) 16

STATE CASES

Beaty v. Kentucky, 125 S.W.3d 196 (Ky. 2003) 8, 9

Brooks v. State, 905 So.2d 678 (Miss. App. 2004) 15

Cleveland v. State, 91 P.3d 965 (Alaska Ct. App. 2004) 8

Commonwealth v. Conkey, 819 N.E. 176 (Mass. 2004) 9

TABLE OF AUTHORITIES – Continued

Page

Commonwealth v. Scott, 564 N.E.2d 370 (Mass. 1990) 7

Ex Parte Hall, 820 So.2d 152 (Ala. 2001) 8

Glaze v. Redman, 986 F.2d 1192 (8th Cir. 1993) 6

Joyner v. State, 678 N.E.2d 386 (Ind. 1997) 7

McCullough v. United States, 827 A.2d 48 (D.C. 2003) 7

Missouri v. Chaney, 967 S.W.2d 47 (Mo. 1998) 9

Moore v. State, 175 So. 183 (Miss. 1937) 8

Oliva v. State, 452 S.E.2d 877 (Va. Ct. App. 1995) 8

Parent v. State, 18 P.3d 348 (Okl. Crim. App. 2000) 9

People v. Fort, 618 N.E.2d 445 (Ill. App. Ct. 1993) 8

People v. Green, 609 P.2d 468 (Cal. 1980) 7

People v. Hall, 718 P.2d 99 (Cal. 1986) 7, 9

People v. Johnson, 200 Cal. App. 3d 1553 (Cal. Ct. App. 1988) 7

People v. Primo, 728 N.Y.S.2d 735 (N.Y. 2001) 8

People v. Rice, 560 N.Y.S.2d 105 (1990) 14

People v. Schwartz, 678 P.2d 1000 (Col. 1984) 9

People v. Yost, 659 N.W.2d 604 15

People v. Williams, 628 P.2d 1011 (Col. 1981) 15

Rivera v. State, 561 So.2d 536 (Fla. 1990) 7

Shields v. State, 166 S.W.3d 28 (Ark. 2004) 8

Smithart v. State, 988 P.2d 583 (Alaska 1999) 8

State v. Adams, 124 P.3d 19 (Kan. 2005) 6

TABLE OF AUTHORITIES – Continued

Page

State v. Beckham, 513 S.E.2d 606 (S.C. 1999) 10

State v. Cooper, 514 S.E.2d 584 (S.C. 1999) 10

State v. Copeland, 300 S.E.2d 63 (S.C. 1982) 4

State v. Cotto, 856 A.2d 660 (N.J. 2005) 8

State v. Denny, 357 N.W.2d 12 (Wis. Ct. App. 1984) 7, 8

State v. Freiburger, 366 S.C. 125 (2005) 15

State v. Fry, 385 N.W.2d 196 (Wi. 1985) 15

State v. Gay, 541 S.E.2d 541 (S.C. 2001) 10, 11, 12, 13, 14

State v. Gregory, 16 S.E.2d 532 (S.C. 1941) 10, 12

State v. Israel, 539 S.E.2d 633 (N.C. 2000) 7

State v. Marsh, 102 P.3d 445 (Kan. 2004) 8, 9

State v. Maupin, 913 P.2d 808 (Wa. 1996) 9

State v. Parker, 366 S.E.2d 10 (S.C. 1988) 10

State v. Parr, 534 S.E.2d 23 (W. Va. 2000) 8

State v. Prion, 52 P.3d 18 (Ariz. 2002) 7

State v. Rabellizsa, 903 P.2d 43 (Haw. 1995) 7, 8

State v. Richardson, 670 N.W.2d 267 (Minn. 2003) 8

State v. Smith, 415 S.E.2d 409 (S.C. App. 1992) 15

State v. Thomas, 83 P.3d 970 (Wash. 2004) 8

State v. Williams, 468 S.E.2d 626 (S.C. 1996) 10

Tice v. Commonwealth, 563 S.E.2d 412 (Va. App. 2002) 9

Turner v. State, 549 P.2d 1346 (Ok. Crim. App. 1976) 15

ARGUMENT IN REPLY

I. Holmes' Constitutional Claims Are Properly before the Court.

The State argues, as it did in its Brief in Opposition to certiorari, that Holmes' Sixth and Fourteenth Amendment contentions are procedurally barred. Respondent's Brief (RB) at 18-24; Brief in Opposition (BIO) at 3-6. These procedural arguments remain meritless. *See* Reply to Brief in Opposition at 1-3.

In *Baldwin v. Reese*, 541 U.S. 27, 32 (2004), this Court informed the bar that a "litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or . . . by simply labeling the claim 'federal.'"[1] In his opening brief to the South Carolina Supreme Court, Holmes specifically asserted that the trial court's refusal to: (a) permit the defense to present evidence that Jimmy White was the actual perpetrator; (b) permit the defense to cross-examine the investigating officers regarding their failure to investigate evidence implicating Jimmy White; and (c) permit the defense to call Jimmy White as a witness, violated "the due process clause of the fifth amendment and . . . the sixth, eighth and fourteenth amendments to the United States Constitution. . . ." Appellant's Final Opening Brief at 19, 21-22, 26 (thrice repeated).[2] Likewise, Holmes specified that the trial court's ruling that Jimmy White's incriminating statements were inadmissible under South Carolina's hearsay rule violated the Due Process Clause and the Sixth,

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[1] *Howell v. Mississippi*, 543 U.S. 440, 442 (2005), holds the same rule applicable on direct appeal.

[2] In South Carolina, the parties file an Initial Appellant's Brief, an Initial Appellee's Brief and an Initial Reply Brief. South Carolina Rule of Appellate Procedure (SCRAP) 208. After the record on appeal is agreed upon, the parties file "final" versions of the briefs which include citations to the record on appeal. SCRAP 211. The language quoted above is also contained in Holmes' Initial Brief.

Eighth and Fourteenth Amendments to the United States Constitution. *Id.* at 30. Nothing more was necessary to present Holmes' federal claims.[3]

Nor did Holmes' presentation run afoul of any state procedural rules. South Carolina Rule of Appellate Procedure (SCRAP) 208 provides only that the "statement [of issues presented for review] shall be concise and direct as to each issue and may be stated in question form." There is no requirement that the sources of law invoked in relation to each issue be designated in the statement of issues. The State has cited no decision of the South Carolina Supreme Court intimating any such requirement.[4] And the opinion of the South Carolina Supreme Court contains no suggestion – let alone a "'plain statement'" (*Michigan v. Long*, 463 U.S. 1032, 1042 (1983)) – that it found any insufficiency in Holmes' presentation of his federal contentions. *See Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).[5]

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[3] Throughout the trial, Holmes argued that the Sixth and Fourteenth Amendments entitled him to present evidence of White's guilt. *See, e.g.*, JA 202; ROA 2034, 2035, 2050, 2714-2715, 3646, 3650.

[4] Since SCRAP 208 requires only a specification of the issues presented for review and not a specification of the sources of law invoked in connection with each issue presented, the South Carolina Supreme Court could not have imposed the latter requirement on Holmes even if it had purported to do so. *See Wright v. Georgia*, 373 U.S. 284, 289-291 (1963), and cases cited. That is all the more reason for this Court to decline to attribute to the South Carolina Supreme Court a state procedural ruling it never made.

[5] The State argues that Holmes has waived any right to challenge the judgment below on federal constitutional grounds because he also argued to the South Carolina Supreme Court that the trial court's exclusion of the third party guilt evidence was erroneous as a matter of state law. RB at 20. However, Holmes was not required to choose between a federal constitutional claim and a state-law claim that the trial court's actions were in error. To the contrary, this was sound constitutional practice, consistent with the first principles of federalism. If litigants were required to forgo state-law claims of error in order to challenge the same ruling of the trial court on federal constitutional grounds, occasions for federal constitutional adjudication would be needlessly multiplied, in violation of the basic precept that federal constitutional questions should be decided only as a matter of last

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II. Holmes' Convictions and Death Sentence Were Obtained in Violation of the Sixth and Fourteenth Amendments.

A. Holmes' Case Is Not Materially Distinguishable from *Chambers v. Mississippi*, and *Chambers* Requires Reversal Here.

As explained in Holmes' opening brief, the South Carolina Supreme Court's decision below cannot be squared with this Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973). Petitioner's Opening Brief (PB) at 36-40. Although the facts of the present case are indistinguishable from those in *Chambers*, the State insists that *Chambers* does not apply.[6] That is plainly incorrect.

The State's principal attempt to evade *Chambers*[7] is based on an assertion that the courts below excluded

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resort. *See, e.g., Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947); *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

[6] The State also contends that "*Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case." RB at 30. That contention ignores the Court's citations to *Chambers* in a range of subsequent cases, attesting that the decision has force and application beyond its own facts. *See, e.g., Rock v. Arkansas*, 483 U.S. 44 (1987); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Green v. Georgia*, 442 U.S. 95 (1979). Our present point, however, is that even if *Chambers* is viewed as an instance of case-specific error correction, an indistinguishable error requires the same correction here. Indeed, as will be discussed below, the constitutional error in Holmes' case is more egregious than the one in *Chambers*; and the consequences of the error are also more dire because Holmes was sentenced to death. *See Burger v. Kemp*, 483 U.S. 776, 785 (1987).

[7] The State also maintains that *Chambers* involved an application of Mississippi's hearsay and "voucher" rules, whereas the present case concerns a rule concerning third party guilt evidence. RB at 26, 31. To the extent this formal distinction is relevant, it cuts in Holmes' favor. First, despite the voucher and hearsay rules at issue in *Chambers*, Chambers was able to present *some* evidence implicating the third party, including a prior written confession. *Chambers*, 410 U.S. at 291.

(Continued on following page)

Holmes' third party guilt evidence on the ground that it was unreliable. RB at 31.[5] That is a bald mischaracterization of the record. In fact, the trial judge concluded that the evidence could *not* be rejected on grounds of unreliability. Specifically, he found that "[t]he defendant's witnesses establish to the Court's satisfaction that sufficient evidence exists from which a jury may conclude a third party, Jimmy McCaw White was in the proximity of Mary Stewart's home near the time the State asserts she was beaten and raped." JA 134. He found that the testimony of Joshua Lytle undermined White's alibi and "supports the testimony of the three 'proximity' witnesses. . . ." *Id.* Regarding

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Holmes, on the other hand, was denied any opportunity to show that White committed the crime. Second, the voucher and hearsay rules in *Chambers* had at least the virtue of applying equally to the state and the defense, but the *Gay/Holmes* standard burdens only the defense. This Court has indicated that such asymmetry makes an evidentiary rule less defensible in due process analysis. *See* note 27 *infra*; and *cf. Wardius v. Oregon*, 412 U.S. 470 (1973).

Moreover, the trial court here ruled that Holmes could not call Jimmy White as a witness for the purpose of impeaching him with prior inconsistent statements because he was not "hostile." ROA 3645. This is the functional equivalent of the "voucher" rule in *Chambers*. And, since in South Carolina, prior inconsistent statements are also admissible as substantive evidence, *State v. Copeland*, 300 S.E.2d 63 (S.C. 1982), the court's ruling deprived Holmes' jury of both impeachment and substantive evidence.

[5] The State also attempts to undermine the significance of various parts of the third party guilt evidence, as though each piece was proffered in isolation. *See, e.g.*, RB at 9 n.7, 13, n.8. While some of the State's quarrels with specific pieces of Holmes' proffered evidence are wrong on their own terms, the fundamental defect in all of these arguments is the State's failure to come to grips with the totality of the mutually reinforcing evidence implicating White, including the proximity witnesses, the incriminating statements, prior assaults against elderly women and a sexual penchant for older women, White's lies about his whereabouts on the morning of the crime and his physical appearance. *See Kyles v. Whitley*, 514 U.S. 419, 437 & n.10, 453 (1995).

White's statements, the trial judge found that "[t]he testimony of Thomas Murray, Steven Westbrook, Mattie Mae Scott and Ken Rhodes . . . rise to the level of testimony from which one could conclude Jimmy McCaw White has admitted in the presence of these witnesses that he beat and raped Mary Stewart." JA 135. The trial judge stated he was "bother[ed]" by White's confessions which "perhaps rise to the level of raising some question about [Holmes' guilt]." JA 141. Finally, the court concluded that the testimony of Ken Rhodes "marginally could be taken as evidence of a penchant for older women by Jimmy McCaw White." JA 135.

The trial judge excluded the third party guilt evidence not because of any reliability concerns, but because: (1) he erroneously concluded that White's statements were not statements against penal interest;[9] and, (2) *without the statements*, which were the "engine" that drove the third party guilt "train," the remainder of the evidence was inadmissible. JA 135. Likewise, on appeal, the South Carolina Supreme Court made no determination that the third party guilt evidence was unreliable. Eschewing the trial court's hearsay rationale, it excluded the evidence by comparing its *weight* to that of the prosecution's case and finding that Holmes "simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence." JA 365.

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[9] A detailed explanation of the trial court's error is set forth in Holmes' opening brief at 41-42, n.15.

B. The South Carolina Rule Announced in Holmes' Case Is Aberrant.

1. Other jurisdictions exclude third party guilt evidence only when it involves mere speculation that would confuse the jury.

The plain fact is that the decision below cannot be justified as an instance of a trial judge's screening proffered evidence for unreliability, nor as an application of the ordinary rules used outside of South Carolina to regulate third party guilt evidence. The State and its *amici* attempt to defend South Carolina's rule by likening it to others from which it differs sharply.[10] They argue that

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[10] Both briefs attempt to portray the South Carolina rule as mainstream. RB at 32-34; Brief for Amici States of Kansas, et al. (AB) at 13. We will show in the following pages that any reading of the cases – including all of those collected in the State *amici*'s appendix – belies this portrait. It is interesting to note that *amici*'s appendix needs to misstate the current South Carolina standard applied in Holmes' case to make it look commonplace. It cites the South Carolina Supreme Court's *Holmes* decision in this case (AB at 20a) but omits the critical language of its holding: "Appellant fails to meet the standard set out in *Gregory* and *Gay* due to the strong evidence of his guilt. He simply cannot overcome the evidence against him to raise a reasonable inference of his own innocence." JA 365.

In a few instances in the body of its brief, *amici* misread cases. They cite *State v. Adams*, 124 P.3d 19 (Kan. 2005), as a case that considers the strength of the prosecution's case in deciding whether to admit evidence of third party guilt. AB at 19. *Adams* does no such thing. Rather, it holds that evidence of motive, standing alone, is inadmissible. In *Adams*, unlike Holmes' case, the third party made no inculpatory statements and had no opportunity to commit the crime; the case merely holds that without "competing evidence" of when and how the injuries were inflicted, this absence of any evidence of opportunity doomed the admissibility of the third party guilt evidence. *Amici* also miscite *Glaze v. Redman*, 986 F.2d 1192 (8th Cir. 1993), as a case that considers the strength of the prosecution's case in ruling third party guilt evidence inadmissible. AB at 19. In fact, *Glaze* analyzes the admissibility of third party guilt evidence without any consideration of the prosecution's evidence; then, after holding the trial court's exclusion of the evidence erroneous, it considers the strength of the State's

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most state courts exclude third party guilt evidence unless it "bears such a connection to the charged offense that it suggests the innocence of the accused." RB at 33; AB at 16. Of course Mr. Holmes has no quarrel with such a rule.[11] In applying it, most jurisdictions listed in the State *amici*'s appendix require only that evidence of third party guilt *tend* to create a reasonable doubt as to the defendant's guilt.[12] "Tendency" is a test for *relevance*.[13] Mere proof of motive or opportunity, for example, is often excluded as irrelevant, or, alternatively, because it may confuse or

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evidence in determining whether the error was harmless. Remarkably, *amici* have found only two opinions in the entire nation that do consider the strength of the State's evidence in determining the admissibility of third party guilt, one unpublished, and the other an intermediate court opinion never approved by the State's highest court. *See United States v. Cabrerra*, 1996 WL 135718 (D.C. Cir. Feb. 15, 1996) (unpublished); *People v. Johnson*, 200 Cal. App. 3d 1553 (Cal. Ct. App. 1988). And even those two opinions do not go as far as the South Carolina Supreme Court below has gone: neither requires that a defendant's evidence "overcome" the prosecution's, and neither evaluates the relative weight of prosecution and defense evidence in a way that discounts defense evidence insofar as it is contested but ignores the contested nature of prosecution evidence.

[11] Nor does Holmes quarrel with 3 of the 4 other formulations offered by the State *amici*: that the evidence proffered must "point clearly or directly to the third party's guilt," (AB at 17) "raise a reasonable doubt as to the defendant's guilt," (AB at 17) or "raise a reasonable inference of the defendant's innocence" (AB at 17). *Amici*'s fourth formulation, attributed to California and requiring that a defendant "demonstrate a substantial probability of the third party's guilt" (AB at 17) comes from *People v. Green*, 609 P.2d 468 (Cal. 1980), which was explicitly overruled on this precise point in *People v. Hall*, 718 P.2d 99 (1986). *See State v. Rabellizsa*, 903 P.2d 43, 46 (Haw. 1997), and *State v. Denny*, 357 N.W.2d 12, 16-17 (Wis. Ct. App. 1984).

[12] *See, e.g., State v. Prion*, 52 P.3d 189, 193 (Ariz. 2002) (*en banc*); *McCullough v. United States*, 827 A.2d 48, 55 (D.C. 2003); *Rivera v. State*, 561 So.2d 536, 539 (Fla. 1990); *Joyner v. State*, 678 N.E.2d 386, 389-90 (Ind. 1997); *Commonwealth v. Scott*, 564 N.E.2d 370, 374 (Mass. 1990).

[13] *See, e.g., State v. Israel*, 539 S.E.2d 633, 637 (N.C. 2000).

mislead the jury.[14] Neither the requirement of relevance nor the exclusion of evidence when its prejudicial effect (including jury confusion) outweighs its probative value "require[s] a defendant to provide evidence that substantially proves the guilt of another. . . . [Such tests require only] evidence that creates the possibility of reasonable doubt." *State v. Cotto*, 865 A.2d 660, 669 (N.J. 2005).

Similarly, courts may require that third party guilt evidence be connected to the crime,[15] be inconsistent with the defendant's guilt,[16] establish some direct connection[17] or link[18] between the crime and the third party, or not be too remote or speculative.[19] All these formulations reflect traditional notions of relevance and probative/prejudice balancing.[20] "[P]hrases like 'clear link' are usually shorthand for weighing probative value against prejudice in the context of third-party culpability evidence: if there is some 'clear link' or 'direct connection' between the third-party evidence and the charged crime, courts generally conclude that it is of sufficient probative value to be admissible." *People v. Primo*, 728 N.Y.S.2d 735, 739-740 (N.Y. 2001).

Holmes' proffered third party guilt evidence would almost certainly be admissible under the rule of every jurisdiction catalogued in *amici*'s brief except South Carolina.

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[14] *See, e.g., State v. Denny*, 357 N.W.2d 12, 16 (Wis. Ct. App. 1984); *State v. Rabellizsa*, 903 P.2d 43, 47 (Haw. 1995); *see also Oliva v. State*, 452 S.E.2d 877, 880 (Va. Ct. App. 1995).

[15] *E.g., Moore v. State*, 175 So. 183, 184 (Miss. 1937).

[16] *E.g., Ex parte Hall*, 820 So.2d 152, 156-157 (Ala. 2001).

[17] *E.g., Cleveland v. State*, 91 P.3d 965, 972 (Alaska Ct. App. 2004); *State v. Richardson*, 670 N.W.2d 267, 280 (Minn. 2003).

[18] *E.g., Shields v. State*, 166 S.W.3d 28, 32 (Ark. 2004).

[19] *E.g., People v. Fort*, 618 N.E.2d 445, 455 (Ill. App. Ct. 1993).

[20] *See, e.g., Smithart v. State*, 988 P.2d 583, 586-587 (Alaska 1999) ("[The direct connection] rule derives from considerations of relevance and materiality."); *State v. Marsh*, 102 P.3d 445 (Kan. 2004); *Beaty v. Commonwealth*, 125 S.W.3d 196, 208 (Ky. 2003); *State v. Thomas*, 83 P.3d 970, 988 (Wash. 2004) (*en banc*); *State v. Parr*, 534 S.E.2d 23, 29 (W. Va. 2000).

Evidence that Jimmy White confessed to the crime, that Jimmy White was in the area near the time of the crime, and that Jimmy White had a history of violence against older women would all be considered relevant because it tends to show that White committed the crime and raises a reasonable doubt as to Holmes' guilt.[21] The evidence is not so remote or speculative that it would prejudice or mislead the jury.[22] The evidence establishes a direct connection or link between White and the crime.[23] This is not a case in which Holmes offered mere speculation that White may have had a motive or an opportunity to commit the crime. Holmes proffered no less than four proximity witnesses, plus four independent confession witnesses, plus evidence that White lied about his whereabouts on the night of the crime, plus evidence of White's motive and propensity.

2. South Carolina has expanded its exclusionary rule in two ways that make it diverge radically from the traditional, commonplace state rule.

Until very recently, South Carolina's third party guilt rules were in line with those of other jurisdictions. In 1941, the South Carolina Supreme Court held unremarkably that trial courts could screen third party guilt evidence by asking

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[21] The cases also treat motive evidence as admissible if there is other evidence connecting the third party to the crime. *E.g., State v. Marsh*, 102 P.3d 445 (Kan. 2004); *Missouri v. Chaney*, 967 S.W.2d 47, 55 (Mo. 1998) (*en banc*).

[22] *See, e.g., People v. Hall*, 718 P.2d 99 (Cal. 1986) (*en banc*); *Allen v. State*, 813 N.E.2d 349 (Ind. App. 2004); *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003); *Commonwealth v. Conkey*, 819 N.E. 176, 183 (Mass. 2004).

[23] For cases illustrating the showing that is sufficient to establish the requisite link, *see, e.g., People v. Schwartz*, 678 P.2d 1000, 1009 (Colo. 1984); *Parent v. State*, 18 P.3d 348, 351 (Okl. Crim. App. 2000); *Tice v. Com.*, 563 S.E.2d 412, 417 (Va. App. 2002); *State v. Maupin*, 913 P.2d 808 (Wash. 1996).

whether the proffered evidence is "inconsistent with [the defendant's] guilt." *State v. Gregory*, 16 S.E.2d 532, 534 (S.C. 1941). South Carolina's relative orthodoxy lasted throughout the twentieth century. Its Supreme Court upheld trial court rulings that third party guilt evidence was inadmissible when the evidence was too tenuous to support an inference of the third party's involvement, *State v. Williams*, 468 S.E.2d 626, 630 (S.C. 1996); *State v. Cooper*, 514 S.E.2d 584, 588 (S.C. 1999), or when the nature of that involvement did not tend to exculpate the defendant. *State v. Parker*, 366 S.E.2d 10, 11 (S.C. 1988); *State v. Beckham*, 513 S.E.2d 606, 614 (S.C. 1999).

Then, in 2001 in *State v. Gay*, 541 S.E.2d 541, the South Carolina Supreme Court moved beyond the traditional screening of reliability and relevance of third party guilt evidence, and began to take the very different approach of *weighing* defendants' proffers of such evidence against the prosecution's evidence. In finding that Gay's proffered evidence did not raise a reasonable inference of innocence, the court relied in large part on "the strong evidence of . . . [Gay's] guilt – especially the forensic evidence – and the fact that the forensic experts found that the samples from . . . [the third party] did not match any of the evidence gathered in this case." *Gay*, 541 S.E.2d at 545. This approach turns the conventional practice on its head and reasons *backward* from guilt to the inadmissibility of evidence of innocence. The trial judge, having found that the prosecution's case against a defendant is "strong," concludes *on that account* that the defendant's otherwise relevant and reliable proof that s/he did not commit the crime because another person alone did so is too unconvincing to warrant consideration by the jury.

In its *Holmes* decision below, the South Carolina Supreme Court not only followed *Gay*'s approach, it extended it. *Holmes* not only holds that the admissibility of third party guilt evidence depends on the strength of that evidence *compared to the strength of the prosecution case*, it interprets *Gay* as categorically excluding third party guilt evidence when the prosecution has presented "strong" forensic evidence against a defendant. *Holmes*, JA

365 ("[W]here there is strong evidence of . . . [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the . . . [defendant's] own innocence."). And it extends the *Gay* rule still further by holding that the strength of the State's evidence for this purpose is to be considered without regard to any rebuttal or controversion the defendant has offered. JA 365, n.8 (dismissing Holmes' claims that the forensic evidence was compromised as "go[ing] to the weight of the evidence, not its admissibility"). Together, these two extensions of *Gay* produce the draconian result that once a prosecutor has presented a facially convincing (to the judge) forensic case, the defendant's third party guilt evidence is *eo ipso* inadmissible.

C. The Arbitrary, Categorical Rule Erected in *Holmes* Violates a Defendant's Right to Present a Complete Defense.

Although a defendant's right to present relevant evidence is not unlimited, "restrictions on the . . . right . . . may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987).[24] *Rock* teaches that a categorical rule which "leaves a trial judge no discretion to admit . . . [a species of] testimony, even if the judge is persuaded of its reliability by testimony at a pretrial hearing," violates the right. 483 U.S. at 56 n.12.

The rule announced and applied by the South Carolina Supreme Court below is that kind of rule. Although the trial judge found Holmes' third party guilt evidence reliable, *see* Part II.A, *supra*, the rule categorically excluded

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[24] For a rule to be found unconstitutional under this test, it must also "infringe[] on a weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). A defendant has just such a "weighty interest" in adducing evidence of third party guilt. *See id.*, citing *Chambers*, 410 U.S. 284 (1973) – a case concerning third party guilt evidence – as an example of a weighty interest.

it because of the prosecution's "strong" forensic case. *Holmes*, JA 365. The rule does not require or contemplate a particularized assessment of the probative value of the proffered evidence. A defendant "fails to meet the standard set out in *Gregory* and *Gay* due to the strong evidence of his guilt. *He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence.*" *Id.*

To assure that a defendant "cannot overcome" a "strong" forensic case against him, the process by which the "strength" of that case is to be measured is non-adversarial. In appraising the state's case, the court below pointedly disregarded Holmes' challenges to the state's forensic evidence. JA 365. That is, the court considered the state's evidence *without regard to any refutation or rebuttal of it* by the defense. The upshot is that all a South Carolina prosecutor now has to do to bar a defendant's third party guilt evidence categorically is to adduce forensic evidence that, *untested*, makes the defendant appear guilty.

Such a rule is antithetical to our adversarial system. "'The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.'" *United States v. Nobles*, 422 U.S. 225, 230-231 (1975). That is why due process guarantees a defendant's "right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). It is why the right is satisfied by nothing less than a "'meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Here, South Carolina denied Bobby Holmes that opportunity.

D. South Carolina Cannot Constitutionally Forbid a Defendant to Present Evidence of Third Party Guilt to the Jury in a Jury Trial When the Evidence is Competent, Reliable, and Central to His Claim of Innocence.

The State argues that Holmes claims an unlimited and unqualified right to present third party guilt evidence. RB at 25. That is not so. Holmes asks only for adherence

to the established rule that a defendant must be permitted to introduce "competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

At no stage of Holmes' case has any court held that the evidence he proffered was either incompetent, unreliable, inessential to Holmes's defense, or irrelevant to a claim of innocence. To the contrary, as we have seen in Part II.B.2, *supra*, the South Carolina Supreme Court below upheld the exclusion of that evidence by, *first*, deriving from *Gay* a rule that third party guilt evidence is inadmissible unless it overcomes the strength of the prosecution's case against the defendant, and, *second*, adding to this *Gay* rule the corollary that third party guilt evidence *simply cannot* overcome a strong prosecution case based on forensic evidence. In the preceding Part II.C, we explained why the second step in this reasoning – *Holmes*' corollary to the *Gay* rule – palpably offends due process. But the first step – the *Gay* rule itself – fares no better under proper Sixth and Fourteenth Amendment analysis.

Having elected a jury trial, Holmes had a Sixth Amendment "right to demand that a jury find him guilty of all the elements of the crime with which he . . . [was] charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995). The trial judge could not direct the jury to find him guilty, *see, e.g.*, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977); *Sandstrom v. Montana*, 442 U.S. 510, 516 n.5 (1979), and while the judge had broad powers to regulate the admissibility of evidence, "the ultimate test of any [evidentiary] device's constitutional validity in a given case[25] remains constant: the device

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[25] The State and its *amici* are correct in their recognition (RB at 25-27; AB at 11) that arbitrary rules excluding entire categories of defense evidence are unconstitutional under this Court's precedents such as *Chambers* and *Rock* and *Crane*, all *supra*. We have invoked that principle in Part II.C, *supra*. But the State and its *amici* are incorrect in asserting that *only* categorical exclusionary rules can violate a defendant's right to present defensive evidence (RB at 27-28, 31; AB at 9, 10, 11-12). In *Olden v. Kentucky*, 488 U.S. 227, 231 (1988), for

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must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979).

The *Gay* rule does exactly that. In an inversion worthy of Lewis Carroll,[26] it requires the judge to weigh the prosecution's evidence and determine whether it establishes the defendant's guilt so firmly that he or she should be forbidden to present exculpatory evidence to the jury. Neither the traditional authority of a trial judge to make "preliminary" factual findings[27] on which rules of evidentiary admissibility depend (*see* RB 36-38; AB 20-23), nor the constitutional freedom of the States themselves to make rules excluding "'[evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion), justify conditioning the admissibility of a defendant's exculpatory evidence, as the *Gay* rule does, on the defendant's ability to convince a judge that the evidence "overcome[s]" the State's case for guilt. It is the jury's role to determine whether the evidence of third party guilt is sufficient to establish a reasonable doubt as to the defendant's guilt.

Here, the third party guilt evidence clearly could have created a reasonable doubt in the mind of a reasonable juror. A brief consideration of how such evidence would have been treated if offered by the prosecution is illuminating. The totality of the evidence pointing towards White was more than sufficient to establish probable cause for his arrest or to bind him over for trial. *See, e.g., People v. Rice*, 560 N.Y.S.2d 105, 107-108 (N.Y. City Ct. 1990);

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example, this Court held that the defendant's Sixth Amendment right to confront witnesses against him was violated by the State court's exclusion of evidence on the ground that its probative value was outweighed by the possibility of prejudice.

[26] "Sentence first – verdict afterwards." ALICE IN WONDERLAND, chapter 12.

[27] *See, e.g.*, Fed. Rule Evidence 104.

State v. Fry, 385 N.W.2d 196, 199 (Wis. App. 1985); *People v. Yost*, 659 N.W.2d 604, 610 (Mich. 2003); *People v. Williams*, 628 P.2d 1011, 1013-1014 (Colo. 1981); *Turner v. State*, 549 P.2d 1346, 1348 (Okla. Crim. App. 1976). Indeed, had the State proceeded against White and secured a conviction against him on the basis of the evidence Holmes proffered, the evidence would have been more than sufficient to sustain the conviction. *See, e.g.*, *Brooks v. State*, 905 So.2d 678 (Miss. App. 2004); *State v. Smith*, 415 S.E.2d 409 (S.C. App. 1992); *State v. Freiburger*, 620 S.E.2d 737 (S.C. 2005). Numerous individuals have been found guilty on less evidence than that which Holmes wanted to present to the jury in this case. Only in South Carolina is such a comprehensive, mutually reinforcing case of third party guilt categorically excluded from the trial.

The point of the bind-over and sufficiency comparisons is this: At a minimum, the defendant should be permitted to "go forward" with evidence that would be sufficient for the State to go forward against the third party. Unless the State is asserting that the prosecution somehow has a monopoly on the presentation of unreliable evidence, if the evidence is reliable enough for the prosecution to present to a jury, it must be reliable enough for the defendant to present to a jury.[28]

III. The State Cannot Demonstrate that the Exclusion of Holmes' Evidence Implicating Jimmy White Was Harmless Beyond a Reasonable Doubt.

For an error to be found harmless, the State must prove "beyond a reasonable doubt that the error complained of did

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[28] This "good for the goose, good for the gander" principle has been previously recognized by this Court. *See United States v. Scheffer*, 523 U.S. 303, 316 n.12 (1998) (noting that the evidence rule at issue in *Washington v. Texas*, 388 U.S. 14 (1967), was problematic because it burdened only the defense and not the prosecution).

not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). Clearly, the State cannot meet that burden here.

First, the State's harmless error argument is fundamentally flawed. The State discusses only the prosecution's evidence implicating Bobby Holmes, and it construes that evidence in the light most favorable to the prosecution. In doing so, the State has only demonstrated that the evidence was sufficient to convict. But the question is not "whether, after viewing the evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is whether "there is a reasonable possibility that the [error] complained of might have contributed to the conviction." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).[29] "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question." *Id.* at 403. A harmless error analysis, therefore, involves two distinct steps. The first step is a complete and objective review of the evidence. *See id.* at 404 (first, a reviewing court "must ask what evidence the jury actually considered in reaching its verdict"). The second step is to weigh the probative force of the evidence the jury in fact heard against the probative force of the evidence as the jury would have heard it if not for the erroneous exclusion. *Id.*

The State's case against Holmes was entirely circumstantial. There were no eyewitnesses, and Holmes consistently and adamantly denied his guilt at all times,

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[29] The State relies on *Rose v. Clark*, 478 U.S. 570, 579 (1986), for the proposition that "a judgment of conviction should be affirmed '[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt.'" RB at 44. This Court has expressly stated, however, that the exact language upon which the State relies, taken out of context and standing on its own, is an incorrect articulation of the harmless error inquiry. *Yates*, 500 U.S. at 402 n.8.

including the time of his arrest, during custodial interrogation and during his testimony at trial. *See, e.g.*, JA 209, 253-54. While the deceased gave varying descriptions of the perpetrator, her earliest statements that that individual was a "short, dark skinned fellow, chunky wide" (JA 142), in his late twenties (JA 149), and with "kind of long hair" (JA 159), bear no resemblance to petitioner. At the time of the offense, Holmes had just turned eighteen and had very short hair; he was also approximately six feet, two inches tall and a very athletic two hundred and thirty five pounds. JA 179. Thus, the State's case for guilt rested almost entirely on the forensic evidence.[30] The State

[30] The State's discussion of the evidence contains a number of misleading or inaccurate statements. For example, the State asserts that two individuals, Gregg Thompson and David Wilson, saw a "black male wearing blue jeans and a black hooded sweatshirt in front of Mary Stewart's home in the early morning hours of December 31st." RB at 47, n.18. Neither Thompson nor Wilson testified at trial or at any hearing in this case. We have only Officer Mobley's testimony that these two men provided him with the information. One must wonder why such important evidence, if true, was not presented at trial.

The State also inaccurately asserts that "petitioner's DNA was . . . found to be consistent with items recovered at the crime scene mixed with the victim's DNA." RB at 8, n.6. Respondent suggests that these unidentified "items" were in addition to the paper towel recovered by Captain Mobley at the crime scene by claiming that "[s]imilarly, Holmes and the victim's (sic) were also the possible contributors to the DNA found on the blue and white striped shirt (Q3) and the other paper towel found at the scene (Q6)." RB at 8, n.6. In fact, the only item of evidence recovered from the crime scene with any alleged mixture of the victim's and petitioner's DNA was the single paper towel recovered by Captain Mobley. JA 246. The State asserted that this mixture was found after PCR DNA testing was completed in 2000. ROA 3522. The State mischaracterizes the testimony of its own experts when it asserts that blood found on the paper towel, petitioner's briefs, jeans, and blue and white striped tank top was initially unidentifiable under 1990 techniques. RB at 7, n.6. Using serology tests, SLED Agent Nancy Greene was unable to identify the blood *type* found on these items in 1990 (ROA 3166, 3181-82) but FBI Agent Lawrence Presley examined the evidence in 1990 using RFLP DNA testing and absolutely excluded Bobby Holmes as a contributor to any of the items of evidence recovered at the crime scene. ROA 3438, 3452, 3459. Agent Presley also absolutely excluded Holmes as a contributor to the blood on the blue and white

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details that evidence at p. 44-50 of its brief, but, in doing so, the State fails to even make a passing reference to the fact that Holmes presented a number of highly trained, well-respected forensic experts whose testimony called into question the reliability and integrity of each and every piece of the State's forensic evidence. This evidence is set forth in detail in Holmes' opening brief at 11-17. Suffice it to say here that the prosecution's DNA evidence, fingerprint evidence and fiber evidence were vigorously challenged at trial by defense experts who criticized the manner in which the evidence was collected, packaged, stored and analyzed.[31] Even the prosecution's own expert, FBI agent Frank Baechtel, admitted that the manner in which the evidence was handled created a risk of contamination. JA 247. Thus, the evidence was far from overwhelming, and a reasonable juror could have harbored a reasonable doubt as to petitioner's guilt based solely on the evidence presented by the defense at trial.[32]

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shirt. Mr. Presley was very confident in his conclusion, stating "[t]hat's an absolute exclusion . . . The bands just don't line up." ROA 3455.

The State suggests that the police had no opportunity for mishandling or manufacturing evidence. RB at 48, n.19. We have explained in PB at 10-17 why this is incorrect.

[31] The following passage from defense expert Dr. E'ustachio discussing problems with the prosecution's DNA evidence is illustrative:

> At the end of the day, it's unreliable tests. The – it wasn't handled in the way that we now know is necessary to prevent contamination from one item to the next or from outside sources. Known samples, which should clearly give us high quality views of those peoples' DNA were clearly degraded. Known samples were handled too close together in time and place with unknown samples. And finally, there are some features of the – where the tracings need to be completely accounted for in order to be scientifically reliable. There are some features of those tracings that did not get interpreted, and it adds up to a test that is not reliable.

JA 310-311.

[32] The State also asserts that "Jimmy White's DNA did not match any of the trace evidence tested." RB at 50. That is as misleading as it is irrelevant. The fundamental flaw in the State's argument is that the

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An additional factor in gauging prejudice, ignored by the State, is the prosecutor's closing argument. *See, e.g., Clemons v. Mississippi*, 494 U.S. 738, 753 (1990); *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988); *Chapman v. California*, 386 U.S. at 26. After having persuaded the trial court to exclude all evidence of White's guilt, the prosecutor addressed the defense's contention that the State's forensic evidence was mishandled or manufactured by asking, "[a]nd if you are going to frame them, and it's going to be Bobby Holmes, where is the raping murdering, beating fellow that actually did this thing." JA 338. Given the prosecutor's exploitation of the absence of the very kind of evidence Holmes was precluded from introducing, it is impossible to say that the error in this case did not contribute to the jury's verdict.[33]

Finally, the exclusion of the third party guilt evidence in this case was not harmless because it deprived Holmes of the ability both to fully challenge the State's forensic evidence and to present the jury with a powerful counter-narrative to the State's case for guilt. Holmes' evidence that White committed the offense would have strongly supported his contention that the forensic evidence was contaminated or fabricated, by furnishing the jury a credible alternative theory of the case. This Court recognized in *Old Chief v. United States*, 519 U.S. 172, 188

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police never conducted a sufficient investigation to determine whether there was forensic evidence linking White to the rape and assault which resulted in Ms. Stewart's death. Despite having information that White had the opportunity to commit the crime, and despite being informed of his incriminating statements, the police never obtained or tested any of White's clothing to determine if there was biological material linking him to the attack, nor did they obtain his shoes in order to compare them to an unidentified shoe print found at the scene. JA 252.

[33] Holmes also submits that the prosecutor's closing argument was a separate and distinct violation of the right of fair rebuttal guaranteed by the Due Process Clause. *See Simmons v. South Carolina*, 512 U.S. 154 (1994); *Skipper v. South Carolina*, 476 U.S. 1 (1986). While this Court did not grant certiorari on this issue, the prosecutor's argument is, under this Court's settled precedent, still a relevant and important consideration in determining whether the error was harmless.

(1997), that in light of jurors' expectations about what proper proof should be, juries may well hold the absence of that evidence against a party who fails to provide it. *Id.* at 188, n.9.

Taking into account all of the trial evidence, the prosecutor's argument, and the probative value of the erroneously excluded evidence, the State cannot establish beyond a reasonable doubt that the denial of Holmes' Sixth and Fourteenth Amendment rights to present a defense did not contribute to the jury's verdict.

CONCLUSION

For these additional reasons, the judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

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